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TRANSPORTATION RESEARCH BOARD
COMMITTEE ON ENVIRONMENTAL ISSUES IN TRANSPORTATION LAW (A4006)

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STATUTE OF LIMITATIONS PREVENTS REVIEWING OLD 4F DETERMINATION

Submitted by Ron Moses
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This case challenges the 4(f) statement prepared in 1987 for the construction of Martin Luther King Jr. Parkway over a certain segment of land known as “Water Works Park” in the City of Des Moines, Iowa. The Plaintiffs contended that the project was now significantly different than it was in 1988, when the Record of Decision was issued. Specifically, a greater number of trees would be removed. The 4(f) statement determined that Water Works Park was not a 4(f) resource, but rather a multiple use facility held principally for water reclamation.

However, the 4(f) statement went on to hold that there was no feasible and prudent alternative to impacting this property, even if it were a 4(f) resource. Thus, the agency used a “belt and suspenders” approach. FHWA filed a Motion to Dismiss based on the six year statute of limitations. The Court found that the statute of limitations barred the plaintiffs from bringing this suit but set a hearing to determine if the statute of limitations had been “revived” by a change in “circumstances,” i.e, alterations in the construction plans. The Court ignored FHWA’s primary finding that the property was not a 4(f) resource. Testimony was received regarding the current proposed use of the property, and then compared to with the description of the proposed use in the 1987-1988 4(f) and EIS. The Court found that the minor differences (“a few more trees”) did not justify reviving the statute of limitations. Judgment entered in favor of FHWA. *Thomas Matthews, et al. v. Norman Mineta, et al.,* No. 4:02-CV-10652

SEPARATE EA/FONSI FOR OVERPASS PORTION OF PROJECT UPHELD

Submitted by Glenn Harris
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On June 4, 2003 the United States District Court for the Eastern District of Wisconsin, rejected the plaintiffs' motion for a permanent injunction, granted judgment in favor of the defendant, and dismissed the case. The plaintiffs alleged a NEPA violation stemming from the creation of an overpass over railroad tracks on State Highway 164 near Ackerville, Wisconsin. The plaintiffs had concerns that a contaminant plume of arsenic and tricholethylene was present in the surface groundwater and would migrate down to the area's drinking groundwater due to the disturbance in the area's soil caused by the pilings for the overpass.

The Court first rejected the defendant's *laches* defense concluding that the plaintiffs had put the defendants on notice that they opposed the project and that an injunction could still alleviate some of the plaintiffs' concerns. Also, the Court noted that informal studies were properly used as supplements to the EA prepared for the overpass project, ruling that a formal supplement to the FONSI is only required when the FONSI is found to be invalid. Next, the Court turned its attention to possible alternatives and ruled that the defendants made a reasonable choice to go forward with overpass construction, as the overpass was sure to solve the safety problems that necessitated the project, and other alternatives to the overpass were considered. Finally the Court concluded that the project had not been improperly segmented. The fact that the overpass was done on an EA and the rest of the widening of State Highway 164 was done on an EIS was logical because there were certain factual situations unique to the overpass area and the segmentation did not limit future options. *Highway J Citizens Group v. Mineta,* No. 02-C-0662 (E.D. Wis.)

HIGHWAY WITHOUT FEDERAL INVOLVEMENT CAN PROCEED AS LONG AS IT NEVER GETS FEDERAL AID

Submitted by Glenn Harris
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On June 19, 2003 the Seventh Circuit Court of Appeals vacated a preliminary injunction granted by the United States District Court for the Southern District of Indiana and remanded the case back to Indiana. The plaintiffs-appellees were alleging that an agreement was reached to use local funds to widen a local street, Third Street in Goshen, only to later designate that street a U.S. Highway in exchange for federal work on another street. This agreement was allegedly reached to avoid the requirements of Sections 106 and 110 of the National Historic Preservation Act, Section 4(f) of the DOT Act, and Section 102 of the National Environmental Policy Act.

The appeals court vacated the injunction because there was no violation of any of the statutes in question. NEPA was not violated because it requires a "recommendation or report" to take effect, and the alleged agreement was never formally presented, discussed or approved by any Federal officials. Further the absence of such a report made it impossible to determine if the agency was acting arbitrarily or capriciously. The NHPA was not violated because none of the NHPA's triggering requirements of expenditure of federal funds, the issuance of a federal license, or agency control or

ownership of the historic property were met in this case. Section 4(f) was disposed of in a similar way. No federal authority had any approval power over the Third Street project so Section 4(f) did not apply. Finally the Court noted that there was no evidence that a street swap was planned. Thus, the wrong relief was given to the plaintiffs. The injunction should not have forbidden all work on the Third Street project but should have forbidden Goshen from ever accepting direct or indirect federal money for the project. *Old Town Neighborhood Ass'n. Inc. v Kauffman,* No. 02-4363

NEW MEXICO HIGHWAY HAS ADEQUATE DOCUMENTATION FOR FINDING OF NO 4F USE OF HISTORIC PROPERTIES

After a case was transferred from the D.C. District Court to New Mexico District Court, another judge gave the go ahead to the reconstruction of 37.5 miles of U.S. 70 as a four lane highway. FHWA concluded after a DEIS, SDEIS and FEIS that the project did not "use" historic properties either because they were not historic or they were not adversely affected. The New Mexico SHPO concurred. The Court found that the Area of Potential Effect had been correctly defined as the area within 150 feet of the roadway but with a variable width where there were historic properties that could have a potential visual effect based on conceptual design of the highway improvement. The Court also went along with a programmatic agreement to cover impacts that are discovered during later design and construction since an adequate job had been done based on the design to date. (This may be a design/build job.) Although the consulting firm that wrote the EIS had a conflict of interest due to a contract to supervise construction, there was adequate involvement by the New Mexico SHTD and FHWA to insure objectivity. *The Valley Community Preservation Commission v. Mineta,* 246 F.Supp.2d 1163 (D.N.M. 2002)`

NATIONAL PARK SERVICE EIS/ROD SUFFICIENT FOR CONSTRUCTION OF SEGMENT OF NATCHEZ TRACE MEMORIAL PARKWAY

The National Park Service (NPS) has been building the 444 mile Natchez Trace Memorial Parkway from Nashville, TN to Natchez, MS for over 60 years. The NPS bought an 800 foot wide mile long strip through Ridgeland, MS in 1967 for this roadway and has been in and out of the NEPA process ever since trying to build on the property they bought. The problem which arose was how to deal with crossing or closing a section of an historic road, the Old Agency Road, which actually served as part of the original Natchez Trace. The first EIS was completed in 1978. A supplement was completed in 2001. In both instances the decision was to close a portion of the old road. NPS and the SHPO disagreed on what made the Old Agency Road historic and eventually the SHPO pulled out of the process and left NPS to consult with the ACHP. After bitter consultation and continued disagreement, the Court endorsed the NPS decision because the proper procedures had been followed. The Court went along with putting off the details of wetland mitigation until later permit discussions with the Corps. The Court also endorsed the identification of the no action alternative in the supplemental EIS as the action that had been approved in the original EIS/ROD. *City of Ridgeland v. National Park Service,* 253 F. Supp. 2d 888 (S.D.Miss. 2002)

USDOT AND CEQ EXCHANGE VIEWS ON PURPOSE AND NEED AND THE ROLE OF THE LEAD AGENCY

On May 6, 2003 the Secretary of USDOT wrote a letter to the Chair of CEQ. The Secretary was concerned about how transportation projects can get stalled when various

agencies of the Federal government do not agree on the purpose and need. He said that some guidance from CEQ may obviate the need to address this issue in Congress in the upcoming reauthorization legislation. CEQ responded on May 12 that the lead agency has "the authority for and responsibility to define 'purpose and need' for purposes of NEPA analysis." CEQ went on to say that when two agencies both have a decision to make on a transportation project, "it is prudent to jointly develop a purpose and need statement that can be utilized by both agencies." If a non-transportation agency has issues with a purpose and need statement, those issues should be raised and elevated to the appropriate level right away.

2ND CIRCUIT WON'T HEAR CHALLENGE TO FAA APPROVAL OF ALP

FAA approved the airport layout plan (ALP) for the airport in East Hampton, NY on the condition that no federal funds would be awarded for improvements called for in the ALP until after satisfactory environmental review. A group of airport opponents challenged FAA's action on the basis that there should have been environmental review before the ALP was approved. The Court decided to join the Ninth Circuit in rejecting review of airport development proposals. The Court interpreted the FAA's statute to mean that review would lie in the District Court unless the FAA's action was limited to air commerce and safety. Rather than send the case to the District Court, the Court dismissed the petition. The Court felt that the petitioners had been guilty of "excessively sharp practice" for not bringing up the Ninth Circuit cases that had rejected review of airport development decisions in the courts of appeal. *Committee to Stop Airport Expansion v. FAA,* 320 F.3d 285 (2nd Cir. 2003)

FAA EA/FONSI OK FOR PHOENIX AIRSPACE CHANGES

In order to address air traffic concerns arising from the growth at Phoenix Sky Harbor Airport, FAA approved changes to the high-altitude arrival and departure procedures to the north, northeast, and northwest of the airport. FAA used its standard noise model, the Integrated Noise Model. The model results showed that although noise would increase at some points, each point would remain below the threshold of significance. The Court found that FAA had followed established procedures and had considered the cumulative impact of its proposal by including ambient noise measurements from all sources. The Court endorsed limiting the study to five years into the future because "It becomes more difficult-as well as increasingly inaccurate-to make projections that stretch even further into the future." The FAA action did not constitute "use" of a ranch protected by 4f because it will not compromise the activities that take place there. *Town of Cave Creek, Arizona v. FAA,* 325 F.3d 320 (D.C.Cir. 2003)

LOUISVILLE, KY AIRPORT CANNOT RECOVER FOR CLEANUP COSTS

After the Regional Airport Authority of Louisville and Jefferson County (RAA) acquired a 131 acre parcel by condemnation for a new west runway, the RAA spent considerable amounts of money to remediate contamination. The site had been used as a foundry, forge and assembly plant. Under prior orders the Court had dismissed the RAA's claim for compensation under the Kentucky Superfund Act and for equitable indemnification under CERCLA. This time the Court ruled that RAA could not pursue actions for nuisance or negligence *per se.* Under private nuisance the Court ruled that if a Kentucky court were ever to rule on the issue, it would follow the majority of courts which have found that a subsequent landowner cannot recover from a prior land owner.

Claims of public nuisance were rejected because there was no allegation of harm to the public. RAA had already been compensated by the reduced price it paid for the land. The remaining negligence count was dismissed because the pollution regulations which RAA said the prior land owner had violated were not written to compensate for cleanup costs, they were meant to protect people. *Regional Airport Authority of Louisville and Jefferson County v. LFG, LLC et al.,* 255 F.Supp.2d 688 (W.D.Ky. 2003)

NPDES PERMITS FOR ABILENE AND IRVING, TX STORMWATER DISCHARGES DO NOT VIOLATE 1ST AND 10TH AMENDMENTS

Two Texas cities challenged the conditions placed on the permits that regulate the discharges from their storm sewers. The conditions required the cities to develop, implement and enforce programs to prevent the discharge of pollutants into their sewers. The conditions also required the cities to implement a public education program promoting proper disposal of pollutants. First, the Court found that the Clean Water Act gave EPA broad discretion in this area. The permit conditions were constitutional because the cities chose the management type permit over a traditional NPDES permit which would have regulated the discharges with numeric end-of-pipe effluent standards. The Court also upheld the finding of the Environmental Appeals Board which found that the cities would not be liable for third party discharges as long as the cities complied with their stormwater management plans. *City of Abilene v. USEPA,* 325 F.3d 657 (5th Cir. 2003)

ROADSIDE DITCH IS WATERS OF THE UNITED STATES

A property owner in the Maryland portion of the Delmarva Peninsula was cited for doing unauthorized work in a wetland on his property. The property owner contended that the property was not a wetland subject to the jurisdiction of the Clean Water Act because it was not adjacent to waters subject to the Corps of Engineers jurisdiction. The property is adjacent to a ditch that runs alongside a county road. The ditch drains through a culvert and some other streams and ponds for 8 miles before the water enters a navigable stream. The Court held that the roadside ditch is a tributary to a navigable water so any wetland adjacent to it is covered. The Court found that this is all within the ambit of the Clean Water Act and within the power of Congress under the Commerce Clause. *United States v. Deaton,* 4th Cir. No. 02-1442, June 12, 2003

PUMPING FLOODWATERS FROM ONE WATER TO ANOTHER REQUIRES NPDES PERMIT
Supreme Court Accepts *Cert.* Petition

Materials submitted by Russ Eggert
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As a result of extensive construction of levees, canals, and water impoundment areas by the US Government many years ago, part of the Florida Everglades was drained. In order to keep the western part of Broward County from flooding, a pump station was constructed to move water from one area to the area that was historically part of the Everglades. The water that is pumped contains higher levels of phosphorus than the receiving waters would experience naturally. The Court determined that this constituted the addition of pollutants (phosphorus) from a point source (the pump) and therefore required a NPDES permit as required by the Clean Water Act.

The South Florida Water Management District, the Defendant in the citizen suit to enforce the Clean Water Act, argued in its Petition for a Writ of Certiorari that the decision was a departure from past precedent that requires that the pollutants be introduced into the receiving waters from the outside world. The District argued that it was being treated like an industrial source who adds pollutants to water and then discharges it. The United States Solicitor General (SG) was asked to give the Supreme Court the views of the Federal Government. The SG said that there was no reason for the Court to review the decision and that the lower court decision was limited by the peculiar facts of the Everglades. The District then filed a Supplemental Brief with the Supreme Court that showed the lower court decision could have national ramifications on water management projects concerning flood control, irrigation and other matters normally left to regulation by the States. The Supreme Court accepted the case for its next term. *Miccosuke Tribe of Indians of Florida v. South Florida Water Management District,* 280 F.3d 1364 (4th Cir. 2002); U.S. Supreme Court No. 02-626

NEW JERSEY TITLE VI/EJ CASE SURVIVES MOTION TO DISMISS

Although this case is not a transportation case, this newsletter has been following it because it has been one of the better known cases on the theory behind environmental justice. The litigation concerns the siting and operation of a cement plant in a low income minority neighborhood. Previous rulings have left the Plaintiffs in the position that they had to allege intentional discrimination by the New Jersey Dept. of Environmental Protection (NJDEP) in its decision to allow the cement plant to operate. The NJDEP claims that this cannot be shown when it applied the same set of environmental review standards to this plant as it would to any other. Plaintiffs insist in their latest Complaint that the cement plant would have a disparate impact on their community and that NJDEP was well aware of this when the permits were issued. The Court has allowed the Complaint to proceed. In additional rulings the Court held that NJDEP could not be guilty of violations of the Fair Housing Act even though its decisions may have an indirect impact on housing in the affected community. The Court cited precedent in the 4th Circuit that the siting of a highway was not a violation of the Fair Housing Act. *South Camden Citizens in Action v. New Jersey Dept. of Environmental Protection,* D.N.J. No. 01-702

HARVARD ISSUES REPORT ON TRANSPORTATION EQUITY

A joint report has been issued by the Center for Community Change and the Civil Rights Project at Harvard University on the economic and social effects of transportation policies. The report summarizes previous research and calls for action in the upcoming surface transportation reauthorization legislation in Congress. The report merges the environmental justice movement with the need for transportation equity through a review of urban renewal, highway construction, racial segregation, urban sprawl and related topics. Transportation equity is characterized as an attempt to secure "…fairness in mobility and accessibility levels across race, class, gender and disability. The ultimate objective of transportation equity is to provide equal access to social and economic opportunity by providing equitable levels of access to all places." The report calls for more spending on public transportation to improve minorities' mobility, enforceable performance measures that measure whether transportation decisions are equitable, improved data collection on the impact of transportation plans and projects on minorities and low income communities, increased funding and enforcement of civil rights laws and

environmental laws and regulations, increased funding for research that examines the social equity impact of transportation projects, recognition of the interaction of transportation with land use and social equity, restoration of the ability to bring Title VI suits based on disparate impacts, more local hiring preferences for transportation projects in areas of high unemployment and poverty, the removal of barriers to minority and low income participation in transportation planning and decision making, preservation of the USDOT DBE program, and preservation and increases in funding for programs that may help to address racial health disparities. Sanchez, Stolz, and Ma; "Moving to Equity: Addressing Inequitable Effects of Transportation Policies on Minorities"
http://www.civilrightsproject.harvard.edu/research/transportation/call_trans.php

CALTRANS POLICY OF ALLOWING FLAGS ON OVERPASSES BUT NOT OTHER POLITICAL MESSAGES VIOLATES FIRST AMENDMENT

After the September 11 terrorist attacks a large number of American flags started to appear on highway overpasses. When two California citizens attempted to place homemade banners on an overpass that questioned the cost of a war on terrorism, the banners were removed. Caltrans took the position that it would have removed the homemade banners if someone else had not. Caltrans only issues permits for signs on overpasses that designate turnoffs for special events. Notwithstanding this policy, Caltrans does not prohibit the display of American flags and does not require permits for their display. The two citizens sued for deprivation of their rights to free speech. The Court ruled that a highway overpass is a nonpublic forum. As such, restrictions on speech had to be reasonable in light of the purpose served by the forum and viewpoint neutral. The Court found that the Caltrans policy was not reasonable. There was just as much risk of distraction or falling objects from flags as from any other banner. The Court rejected the notion that a flag encompasses so many different viewpoints that it represents no viewpoint at all. The Court found that the flag evoked a very strong message and that for many people it stood for no dissenting opinions. When Caltrans countered that it was entitled to endorse the display of the flag as an arm of State government, the Court responded:

> "Caltrans is not executing a government-funded project to promote national unity or support the war effort. Such an undertaking must be implemented via elected policy-makers who are accountable to the public, not by transportation employees who permit, ad hoc, the display of certain banners and not others."

The Court concluded its opinion as follows:

> "In the wake of terror, the message expressed by the flags flying on California's highways has never held more meaning. America, shielded by her very freedom, can stand strong against regimes that dictate their citizenry's expression only by embracing her own sustaining liberty."

Brown v. California Dept. of Transportation, 321 F.3d 1217 (9th Cir.2003)

ATLANTA AIRPORT CAN PROFIT FROM NEWSRACK RENTAL BUT CANNOT HAVE COMPLETE DISCRETION TO DECIDE WHICH NEWSPAPERS TO ALLOW

When the City of Atlanta, Department of Aviation adopted a fee schedule for use of City owned newsracks at Hartsfield International Airport the newspapers sued for violation of the First Amendment. In an *en banc* opinion the 11th Circuit ruled that the airport was a nonpublic forum. Although the restrictions placed by the Department of Aviation were viewpoint neutral, they were not reasonable. Since the City was acting as a proprietor, it

was allowed to make a profit from the use of its newsracks as long as the rent it charged was not unreasonable. In this case, the fees were reasonable. The Department had to have standards by which to accept, reject, or cancel a publisher's request to use the newsracks. In this case there were no such standards. *Atlanta Journal and Constitution, et al. v. City of Atlanta,* 322 F. 3d 1298 (11th Cir. 2003)

7TH CIRCUIT BADMOUTHS AMORTIZATION OF NONCONFORMING SIGNS

The City of Galesburg, Illinois adopted an ordinance which made nearly all of the billboards in its town nonconforming. The ordinance declared that all of the nonconforming signs had to be removed without compensation by 2009. The owner of most of the signs went to State court to challenge the ordinance under State and Federal law. The City removed the case to Federal District Court where the case was dismissed in its entirety. The 7th Circuit reversed and sent the case back so that the remaining State law claims could be resolved in State court. In *dicta* the Court characterized amortization as follows:

> "The United States, acquiring land for a post office, could not say anything like: 'You have ten acres now; we are taking one of them, and the nine left behind compensate you for the acquisition.' Nor could Illinois announce tomorrow that on January 1, 2100, all private property within its borders must be handed over to the state without compensation, even though the delay would allow owners to extract 95% of the land's value."

. *Key Outdoor, Inc. v. City of Galesburg*, No. 02-3397, April 24, 2003

LAWFUL NONCONFORMING STATUS OF SIGN SURVIVES CHANGE OF OWNERSHIP

In 1983, Mr. Hobbs purchased land along I-95 in Brevard County, Florida. The land had a sign on it. The land was later rezoned residential which made the sign nonconforming. The campground which advertised on the sign held the State permit. The campground gave notice that the sign permit should be cancelled, but no one told the land and sign owner, Hobbs. Florida DOT refused to issue a permit to Hobbs because the sign did not conform to the Act and rules. The Court rejected the DOT's position and ordered that Hobbs get a permit. The Court followed the precedent that says that the nonconforming use can continue as long as the use continues, no matter who owns the property. Even though the sign was blank for awhile, the use was not abandoned because Hobbs was seeking permission to advertise on the sign while it was blank. *Hobbs v. Dept. of Transportation,* 831 So. 2d 745 (Fla. App. 5 Dist. 2002)

ADS ON THE OUTFIELD FENCE VIOLATE IOWA OUTDOOR ADVERTISING ACT

The boosters of a Catholic high school athletics program in Gilbertville, Iowa showed their support by buying ads on the outfield fence of the ball diamonds . The ads were visible to a nearby State highway. Iowa DOT gave notice that the signs either had to come down or be shielded so that drivers could not see them. The Iowa Supreme Court ruled that the signs were not "on-premise" because they advertised "goods and services available to the public well beyond the centerfield fence." The Court went on to hold that the Iowa Outdoor Advertising Act did not regulate content of commercial speech, it just regulated location. The Act also advances a substantial governmental interest in protecting the traveling public while preserving the landscape adjoining Iowa's highways. *Immaculate Conception Corp. v. Iowa Dept. of Transportation,* 656 N.W. 2d 513 (2003)

CHAIR'S CORNER

Submitted by Helen Mountford
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The 42nd Annual Workshop on Transportation Law in New Orleans is almost upon us. Our session on Air and Traffic Modelling for Lawyers should be helpful to those of us who have difficulty with the technical aspects of those subjects. Thanks to Ed Kussy of FHWA for arranging the speakers to be with us.

The Environmental Issues in Transportation Law Committee will meet on Monday, July 21, in New Orleans. Check at the hotel for the location. I hope to see all the members and friends of the committee there.

NEXT COPY DEADLINE IS SEPTEMBER 15, 2003

Please get your submissions for the October, 2003 *Natural Lawyer* into the Editor by the close of business on September 15, 2003. Please use the e-mail address or FAX number listed at the beginning of the newsletter or mail to Rich Christopher, IDOT, 310 South Michigan, Chicago, IL 60604.